

b.) Remarks

Claim 1 has been amended in order to recite the present invention with the specificity required by statute. Claim 102 is amended for better conformity therewith. No new matter has been added.

Claims 102-105 and 112-118 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In response, claim 102 is above amended closely along the lines kindly suggested by the Examiner. The Examiner's efforts and cooperation in expediting the prosecution of this application are gratefully appreciated.

Claims 98, 102-105 and 108-118 are rejected under 35 U.S.C. §103(a) as being unpatentable over the art of record.

At the outset, the Examiner disregards the showing that whey protein is superior to soy protein since such has not been submitted in an affidavit. This is not well-understood; the published prior art specifically evidences the understanding of those of ordinary skill in this art. Nonetheless, such is believed to be moot in view of the foregoing amendment, as discussed below. As a second formal matter, the Examiner also focuses on the previous Heuer Declaration and correctly points out it does not compare the scope of the present invention to the prior art. However, Applicants respectfully wish to clarify they are not relying on that Declaration for precisely that reason.

The Examiner's basis of rejection is set forth at pages 3-9 of the Office Action. The art relied upon by the Examiner is Tabor (US Pat. 6,482,448) in view of Hastings (US 2001/0041187), Miller (US Pat 6,019,999), Ostlund (US Pat 5,550,166) and

Shimizu (US Pat 6,004,926), relied on previously, in view of Goldberg et al (*Med. Sports Sci.*, Vol. 7, No. 3 (1975) 185-98) and Goldberg (*Diabetes*, Vol. 28, Supp. 1 (1979) 18-24), both of record but newly-applied.

In support of the rejection the Examiner relies on Tabor as showing soy protein with carbohydrate. However, as the Examiner is aware, claim 98 is above amended to delete "soy"; accordingly Tabor is now irrelevant as prior art. Additionally, it should be noted Tabor utilizes soy because it contains isoflavones (see column 1, lines 49-50), which are not present in whey. Accordingly, Tabor is of even less relevance for these reasons as well. Hastings too relates "soy-based performance-enhancing dietary supplements" which are taught to be of use specifically because they contain isoflavones (see para [0007], lines 4-6) and so is of no more relevance than Tabor.

These deficiencies are not remedied by the secondary references.

Miller teaches use of whey protein for increasing lean body mass, but does not teach or suggest combining whey with "a compound which mimics or enhances insulin activity... and at least one ingredient which increases nitric oxide production" as recited in claim 98 of the instant application.

Ostlund is relied upon as showing a compound that mimics or enhances insulin activity. However, Applicants' detailed review shows Ostlund relates to pinitol and derivatives thereof for treating metabolic disorders. Specifically, Ostlund state that

"[p]initol and derivatives and metabolites thereof are useful in nutritional and medicinal compositions for treating conditions associated with insulin resistance, such as...complications arising from athletic activity or inactivity."

For one thing, Ostlund does not teach or suggest using pinitol for achieving enhanced muscle size and strength (since such is neither a condition associated with insulin resistance nor a complication of exercise). For another, Ostlund does not teach or suggest doing so in conjunction with whey and an NO-promoting compound.

Shimizu and both Goldberg references fail to teach or disclose at least one ingredient which increases nitric oxide production.

Accordingly, respectfully submitted, the pending claims are *prima facie* obvious over the prior art.

Claims 98, 102-105 and 108-118 are presented for continued prosecution.

In view of the above amendments and remarks, Applicants submit that all of the Examiner's concerns are now overcome and the claims are now in allowable condition. Accordingly, reconsideration and allowance of this application is earnestly solicited.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our below listed address.

Respectfully submitted,

/Lawrence S. Perry/
Lawrence S. Perry
Attorney for Applicants
Registration No. 31,865

FITZPATRICK, CELLA, HARPER & SCINTO
30 Rockefeller Plaza
New York, New York 10112-3801
Facsimile: (212) 218-2200

LSP\ac

FCHS_WS 2191848_1.DOC